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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 779

CITY OF JACKSON, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF MISSISSIPPI; WALTER A. SCOTT, MAYOR; A. F. HAWKINS AND R. M. TAYLOR, COMMISSIONERS THEREOF,

Petitioners,

vs.

MISSISSIPPI POWER & LIGHT COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. MORGAN STEVENS,
W. E. MORSE,
Counsel for Petitioners.

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Petition.

The City of Jackson, a municipal corporation under the laws of the State of Mississippi; Walter A. Scott, Mayor thereof; A. F. Hawkins and R. M. Taylor, Commissioners thereof, all resident citizens of Jackson, County of Hinds, State of Mississippi, pray that a writ of of certiorari issue to review the judgment of the Circuit Court of Appeals

for the Fifth Circuit, entered January 17th, 1941, reversing the judgment of the District Court for the Jackson Division of the Southern District of Mississippi dismissing for want of jurisdiction the petition of Mississippi Power & Light Company, respondent herein, "for a Declaratory Judgment and ancillary relief" filed as Civil Action No. 181 on the docket of said District Court (Cause No. 9584, C. C. A.).

The judgment of the District Court, omitting caption, reads:

> "This cause came on to be heard upon the petition of plaintiff for a Declaratory Judgment and the motion of the defendant to dismiss, and the Court having considered same and being now advised in the premises and being of the opinion that this Court has no jurisdiction of this cause, it is, therefore, considered by the Court that the petition filed by the plaintiff be and the same is hereby dismissed for lack of jurisdiction and the plaintiff taxed with the costs.
>
> "So ordered on this the 18th day of June, 1940.
>
> "S. C. MIZE,
> United States District Court." (Tr. 91).

The judgment of the Circuit Court of Appeals, omitting caption, is as follows:

> "This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;
>
> "On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;
>
> "It is further ordered and adjudged that the appellees, City of Jackson, and others, be condemned, in solido, to pay the costs of this cause in this Court."

Petitioners make this application for a writ of certiorari on the question whether the Federal District Court has jurisdiction of a petition for a Declaratory Judgment alleging that respondent as plaintiff had a contract franchise with the City of Jackson to furnish gas from a natural gas field located at Jackson, Mississippi, at rates fixed therein, with an optional provision to seek gas elsewhere when the Jackson field became insufficient and furnish it on adequate rates to be determined and fixed; that the plaintiff had fully complied with the contract; that the Jackson gas field is presently insufficient for the performance of the contract; that plaintiff has sought, obtained and is furnishing pipeline gas from foreign fields at rates initiated by it but not approved by the City as the rate-making power; that the City claims that the Jackson field is still sufficient, with a prayer for a declaration of rights, and particularly that "(a) Under said contract plaintiff has a right, as at now, and from February 7, 1940, to furnish in said City pipeline gas, and that the rates prescribed by Section 3 of the contract do not apply thereto; (b) That under said contract, plaintiff has the right, if the Court be of opinion that said plaintiff may not so furnish pipeline gas, to discontinue furnishing said City and its inhabitants pipeline gas and to leave the said City solely dependent upon that portion of the gas originating from said Jackson field that plaintiff may supply, and for such other, further, and general relief as in equity and good conscience may seem meet" (Tr. 17). There is presented the question whether under the Johnson Act (Judicial Code, Section 24, amended; 28 U. S. C. A. 41 (1) 481 at Large 775, Chap. 283) the Federal District Court has jurisdiction on a petition "for a Declaratory Judgment and ancillary relief," (Tr. 3) to review a contract franchise granted by the City of Jackson to respondent to furnish natural gas to the inhabitants of the City of Jackson and its industries on rates therein

approved "so long as commercial natural gas is produced in commercial quantities in the City of Jackson or in a radius of 40 miles thereof in the State of Mississippi sufficient to supply the City of Jackson and its inhabitants and its industries"; and establishing "rates and charges for natural gas service in Jackson for gas taken from the natural gas field or from a commercial gas field within a radius of 40 miles of Jackson, Mississippi," and providing "Should Jackson gas field or all the gas fields in the State of Mississippi within a radius of 40 miles of said City become insufficient for the performance of that hereunder required of the grantee, it may thereafter, and not before, obtain natural gas from other fields and rates therefor shall be fixed hereunder that are just and reasonable," and providing that this provision is purely optional with the grantee, imposing no obligation to maintain its equipment for manufacturing gas or to contract for gas from any foreign field, and providing also that grantee might under the option supply artificial gas or a mixture of artificial and natural gas and that just and reasonable rates should be fixed therefor; and to determine the factual issue whether the Jackson gas field is or is not sufficient when the Court concededly under the Johnson Act has no jurisdiction to suspend or enjoin the rates fixed in the contract franchise or the new rates initiated by respondent on its assumption that the gas field is insufficient.

There is presented concretely the question whether, conceding that the Federal District Court has no jurisdiction under the Johnson Act to suspend or enjoin rates, nevertheless a utility company bound by its contract franchise to furnish gas for 25 years or so long as commercial natural gas is produced in commercial quantities in the City of Jackson or in a radius of 40 miles thereof sufficient to supply the demand, is at liberty to initiate higher rates for pipeline gas on the assumption that the Jackson field is in-

sufficient and after raising the gas rates petition for a declaration of rights, the necessary effect of which would be to suspend the rates fixed by the contract franchise and to sustain the rates promulgated by the company, especially when the same issue has been presented in a suit filed by petitioners as complainants against respondent in the Chancery Court of Hinds County, Mississippi, was removed to the Federal District Court and remanded by said Federal District Court, and is now pending in a State court of competent jurisdiction on issues which necessarily embrace the factual issue whether the Jackson gas field is sufficient or insufficient and whether or not the higher rates initiated by respondent under its assumption that the gas supply was insufficient should stand. May the Federal District Court, concededly having no jurisdiction to suspend or enjoin rates, determine a purely controverted issue of fact without giving other or further relief?

Statement.

Plaintiff, a Florida corporation, invoked the Declaratory Judgment Act upon the grounds (a) diverse citizenship, (b) rights alleged to arise under the Constitution, with the amount in controversy in excess of $3,000.00 (Tr. 3). It submitted and relied upon the contract franchise executed October 20, 1930, wherein respondent "is hereby granted on the terms and conditions hereinafter contained * * * the franchise right and privilege to operate gas works for natural gas * * * to be used in furnishing or supplying said municipality * * * with natural gas for fuel, power, light or any other lawful purpose." The franchise is for 25 years conditioned on the plaintiff furnishing gas to the City of Jackson and its inhabitants "so long as commercial natural gas is produced in commercial quantities in the City of Jackson * * * sufficient to supply the demands of the City of Jackson and its inhabitants and its industries."

Section 3 of the contract franchise establishes the rates and charges for natural gas. Section 5 provides that should the Jackson gas field become insufficient the grantee might thereafter, and not before, obtain natural gas from other fields "and rates therefor shall be fixed hereunder that are just and reasonable." The petition averred that when the contract was made more gas was produced than could be distributed or consumed locally and that certain pipe lines were constructed to

(a) Mobile, Pensacola, Bogalusa and the Mississippi Coast;

(b) Magnolia;

(c) Hattiesburg;

(d) Canton;

(e) Clinton (Tr. 8).

And in presenting its cause to the Circuit Court of Appeals, respondent stated "plaintiff does not own gas wells, has no contract relation with such owners other than as averred and the remaining gas 'is not available' and renders the supply at Jackson insufficient," thereby conceding that more gas is produced in the Jackson field than is distributed by respondent locally, but respondent averred that "there was not and is not presently, as at February 7, 1940, or at any time since, nor will there be from said Jackson gas field at any time in the future * * * natural gas in commercial quantities sufficient in the Jackson gas field to meet Jackson requirements under said Section 3" (Tr. 14). The petition further alleged that Love Petroleum Company was under contract to respondent to furnish 40 per cent. of the gas needed by the City, a contract with the Jackson Oil and Gas Company for 10 per cent. supply and a contract with the United Gas Pipeline Com-

pany to supply 50 per cent., "but thereasto plaintiff had no contract right so as to make said United supply all gas by it produced in the Jackson field. The United was obligated to other communities and performed its obligation in accordance with the legal import thereof;" that other gas wells were owned or controlled by the Willmut Gas & Oil Company for use in its pipeline; by the City of Canton for use in its pipeline, and by certain other individuals. Respondent had anticipated the needs of Jackson and planned therefor, and being advised by the United, a company engaged in the transportation and distribution of gas from the Louisiana and Texas fields, that the available gas at Jackson was rapidly being depleted, had proceeded to contract for pipeline gas from United; that the contract franchise "does not fix the rate whereat said pipeline gas is to be sold in Jackson;" that respondent "filed with the City a gas rate for the service rendered as to all gas which plaintiff is compelled to furnish from said pipeline;" (Tr. 16) and that "for such pipeline gas so thus consumed by said City of Jackson and its inhabitants, plaintiff is entitled under said contract to have this right established and adjusted, and the right thus to do is that whereasto a declaration by this Honorable Court is requisite" (Tr. 15).

Shortly after the filing of this petition for a Declaratory Judgment, petitioners exhibited their bill of complaint in the State court of Hinds County, Mississippi, to enjoin respondent from demanding, charging or collecting the higher rates for so-called pipeline gas. A petition to remove the case to the Federal District Court was filed and overruled, whereupon respondent sought and obtained a restraining order from Honorable S. C. Mize, Federal District Judge, and filed the record with the Federal District Court. A motion to remand was presented, argued and sustained. Said cause was remanded before the motion to dismiss the

petition for a Declaratory Judgment was submitted, although said motion was then pending. Petitioners presented their motion to dismiss upon the following grounds:

"1. Because this Court has no jurisdiction of the subject matter.

"2. Because the complaint is insufficient as a matter of law to state a cause of action against these defendants.

"3. Because the plaintiff has a plain, speedy, and efficient remedy at law, or in equity, in the Courts of Mississippi.

"4. Because the complaint shows on its face that the plaintiff was awarded a franchise contract for twenty-five years, conditioned on the plaintiff furnishing gas to the City of Jackson and the inhabitants thereof on the schedule of rates therein provided as long as commercial natural gas is produced in commercial quantities in the City of Jackson or in a radius of forty miles thereof in the State of Mississippi, sufficient to supply the demands of the City of Jackson and its inhabitants and its industries, and the complaint shows on its face that commercial natural gas is produced in commercial quantities in the City of Jackson or in a radius of forty miles thereof in the State of Mississippi sufficient to supply the said demands, it affirmatively appearing from the bill of complaint and exhibits that the total amount of commercial natural gas produced in commercial quantities in the City of Jackson and in a radius of forty miles thereof is more than ample to supply the demands of the City of Jackson and its inhabitants and its industries, and that the plaintiff has failed, neglected and refused to control the said demand, although it obligated itself to do so in the contract franchise.

"5. Because the Federal District Court under the Johnson Act (U. S. C. A. Title 28, Sec. 41 Subd. (1) (1)) has no jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation or execution of any order of an administrative board or commission of a State or any rate-making body of any political sub-

division thereof, or to enjoin, suspend, or restrain any action in compliance with any such order in all cases where such order affects rates chargeable by a public utility, and had been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the Courts of such State, and because the complaint shows on its face that a franchise contract was awarded to the plaintiff, after notice and hearing, and has been in force and effect since October 20, 1930, and because the plaintiff is here attempting to do indirectly, through the medium of a declaratory judgment, what the plaintiff could not do directly; the Declaratory Judgment Act is not jurisdictional but procedural only, and this Honorable Court has no authority to apply or enforce, and the plaintiff has no right to invoke a remedy in the cause over which the Court has no jurisdiction. If the Court should grant the relief prayed for, the plaintiff would be entitled to an injunction based thereon in violation of the letter and spirit of the Johnson Act.

"6. Because the complaint shows upon its face that the plaintiff has now attempted to promulgate and put into force and effect a new rate—one not based on the contract Exhibit "A"—and has attempted to base said rate upon the alleged cost of pipeline gas or gas which the plaintiff says it is now obtaining from the United Gas Pipeline Company; and plaintiff is erroneously attempting to have this Honorable Court assume the jurisdiction of rate-making when the complaint reflects on its face that no new rate has thus far been fixed by the City of Jackson, as a rate-making authority, or agreed upon by the parties, and that the new rate promulgated by the plaintiff has not been approved or agreed upon and is without authority of law, and that the plaintiff has not exhausted its remedy to have an alteration of the contract rate, reflected by Exhibit "A", or to fix any new rates that are just and reasonable."

No written opinion was filed by the learned District Judge, but the judgment of the Court dismissed the petition for

want of jurisdiction. The Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the District Court as shown by its judgment, supra, and as reflected by the opinion rendered by Judges Foster, Hutcheson and McCord, Mr. Justice Hutcheson writing the opinion of the Court, which opinion is not yet reported.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that the learned District Court had jurisdiction.

2. The opinion, among other things, recites "The allegations of the complaint, that plaintiff has been compelled to institute and put in effect, reasonable rates for the pipeline gas it is furnishing, aside, every allegation has to do with and is directed to the single question of a determination and declaration as to whether the Jackson field is insufficient and if it is, as to the rights of the parties under the changed conditions. The allegations as to rates instituted by the plaintiff are not necessary to the tendered issue," etc. This assumes that the Court should ignore the vital averment that respondent has initiated higher rates and the manifest purpose to have the Federal Court approve its action in so doing and therefore to have the Federal District Court do indirectly what it could not do directly.

3. In necessarily holding that the Federal District Court should take jurisdiction of a purely fact issue in a case where it does not have the jurisdiction and therefore the power to enforce its judgment without expressly violating the provisions of the Johnson Act.

4. In reducing the Federal District Court to a mere commissioner or fact finding agency and to leave to some other court in some other case the enforcement of its finding.

5. The federal court has no jurisdiction to determine a fact issue without at the same time applying the law to the facts so determined and entering a final decree disposing of all issues presented by the pleadings in the given cause.

6. In failing to recognize that any decree adjudging the Jackson gas field insufficient would automatically suspend the rates agreed upon and approved in the contract franchise.

7. The Court is in error in overlooking or ignoring the general statement of the petition of respondent that "There is need for a Declaratory Judgment and ancillary relief" (Tr. 3); the averment that respondent had "filed with the City a gas rate for the service rendered as to all gas which plaintiff is compelled to purchase from said pipeline" (Tr. 16); the averment "for such pipeline gas so thus consumed by said City of Jackson and its inhabitants, plaintiff is entitled under said contract to have this right established and adjusted, and the right thus to do is that whereasto a declaration by this Honorable Court is requisite," (Tr. 15) and in putting aside the general prayer "for such other, further and general relief as in equity and good conscience may seem meet"; therefore overlooking the fundamental aim and purpose of the petition of respondent, to-wit, justification to suspend the old rate and substitute a new and higher rate.

8. The opinion and judgment of the Court is contrary to the holding of the Federal District Court in prior litigation between the Mississippi Power & Light Company, respondent herein, and the City of Jackson (9 Fed. Supp. 564); the principles announced by the special statutory three-judge court in *Sears, Roebuck & Company* v. *Roddewig*, 24 Fed. Supp. 321; the principles announced by the Circuit Court of Appeals for the Third Circuit in *Wm. B. Scaife & Sons Company* v. *Driscoll, Collector of Internal Revenue* (C. C. A. 3rd), 94 Fed. 2d 664; the pronouncements

of the Circuit Court of Appeals for the 9th Circuit in *Southern Pacific Company* v. *McAdoo,* 82 F. 2d 121; the pronouncements of the Circuit Court of Appeals for the Seventh Circuit in *American Automobile Insurance Company* v. *Freundt,* 103 F. 2d 613, and the principles announced in *Aetna Casualty & Surety Company* v. *Quarles,* 92 F. 2d 321, and *U. S. F. & G.* v. *Koch,* 102 F. 2d 288; and also the holding of the Federal District Court in *Lake Erie Prov. Company* v. *Moore,* 11 Fed. Supp. 522, that "the declaration of a right without the right to make it effective would appear at first impression to be a vain proceeding. * * * Relief under the Declaratory Judgment statute only may be had where the court has jurisdiction (includes power) to grant it." And other like decisions to be noted in the brief.

9. The Circuit Court of Appeals did not refer to and presumably attach no significance to the admissions of learned counsel for respondent in their brief, filed with said Court (page 27), that the City of Jackson had filed a suit against respondent and quoting from the prayer of the bill in that case, thereby reflecting that the learned District Judge, after having reviewed the pleadings in that case on motion to remand prior to the entry of any judgment dismissing this cause for want of jurisdiction, had the discretion to require respondent to exhaust state remedies, especially when the very issue here presented as to the sufficiency or insufficiency of the Jackson gas field is necessarily and directly involved in said State court proceeding where the State court has jurisdiction of the subject matter and the parties.

Reasons for Granting the Petition.

1.

This case presents an important question of jurisdiction. If the cause is remanded and the learned District Judge

goes into the fact issue as to the sufficiency or insufficiency of the Jackson gas field, all parties will be involved in great cost, energy and expense. The Court will take judicial knowledge of the fact that the inquiry would necessarily involve geological formations, gas pressure, reasons why certain wells have quit producing, the probability of continued production in wells already drilled, the possibility of drilling additional wells, and all questions pertaining to available supply of gas in the Jackson gas field.

2.

If the opinion and judgment of the Circuit Court of Appeals is erroneous, petitioner would have the right of a subsequent appeal to the Circuit Court of Appeals with the ultimate right to have this Court finally determine the question of jurisdiction and if the Court has no jurisdiction then the abortive effort to try the fact issue as to the sufficiency or insufficiency of the Jackson gas field would settle nothing.

3.

It is believed, and our contentions will be, that respondent has here asked the Federal District Court to do indirectly that which could not be done directly, to-wit, exercise jurisdiction "to suspend or restrain the enforcement, operation or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend or restrain any action in compliance with any such order where jurisdiction is based solely on the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order is one that affects rates chargeable by a public utility," etc. 28 U. S. C. A. as amended, Paragraph 41 (1, 1 a). "The Supreme Court has held that the Declaratory Judgment Act is not

jurisdictional but procedural only; and that it merely grants authority to courts to use a new remedy in causes over which they have jurisdiction." (*American Automobile Insurance Company* v. *Freundt*, 103 F. 2d 613 (C. C. A. 7th). "The mere fact that a Declaratory Judgment is sought is not of itself a ground for Federal jurisdiction." (*Southern Pacific Company* v. *McAdoo* (C. C. A. 9th) 82 F. 2d 121.) This new remedy is a procedural statute and as has just been stated by this Honorable Court, headnote 6, *Sibbach* v. *Wilson & Company*, Law ed. Advance Opinions, 85 Law Ed. 349, No. 6, "Procedure is the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard and infraction of them." It is believed that the rights and duties here recognized by substantive law are withdrawn from Federal jurisdiction and that the purpose of Congress in delimiting the jurisdiction over rates also denies jurisdiction of any remedy to suspend rates or to justify a new and higher rate.

4.

Because the principles announced by the Circuit Court of Appeals conflict with the principles announced by the three-judge court in *Sears, Roebuck & Company* v. *Roddewig*, 24 Fed. Supp. 321, and *Wm. B. Scaife & Sons Company* v. *Driscoll, Internal Revenue Collector* (C. C. A. 3rd), 94 F. (2d) 664, and involving tax cases withdrawn from the jurisdiction as much so as rate cases. In the first tax case mentioned, the Court in part said "A suit to enjoin a tax and a suit to enjoin the use of the means provided by the taxing statute for the collection of the tax would seem to be the substantial equivalents of each other. If a Federal district court has jurisdiction to enjoin the imposition of the penalties provided in a State statute for failure on the part of a taxpayer or one whose duty it is to collect and remit taxes,

it has, as a practical matter, jurisdiction to prevent the collection of the taxes." In the second tax case mentioned, it was held that the Johnson Act "specifically excluded the question of Federal taxation from the operation of the Declaratory Judgment Act," but the appellant there unsuccessfully urged his right to compel the collector to accept and file an amended return, the Court saying "If the appellant can succeed in this purpose, the tax thus assessed will be smaller in amount than that which would be assessed on the basis of the first return. The suit at bar is in reality one to restrain the assessment and collection of a tax." The principles thus announced should rule the case at bar.

5.

It is believed, and it will be our contention, that the principles announced by the Circuit Court of Appeals in this case clash with those announced and applied in *U. S. F. & G. Company* v. *Koch*, 102 F. (2d) 288, that "The report of the Judiciary Committee of the Senate states that there is a discretion under the statute, 'not to issue the judgment if it will not finally settle the rights of the parties' "; a determination of the sufficiency or insufficiency of the Jackson Gas Field would probably relieve respondent from the obligation of continuing the old rate, but it would not settle the rights of the parties as to a proper reasonable rate for pipeline gas. That issue could only be determined by the Mayor and Commissioners of the City of Jackson constituting the rate-making body under the Mississippi Statutes.

6.

Because the opinion and judgment complained of would require the Federal District Court to take jurisdiction of a purely fact issue in a case where it does not have jurisdiction of the rights and duties recognized by substantive law, or the power to enforce its judgment without expressly

violating the provisions of the Johnson Act and in reducing the Federal District Court to a mere commissioner or fact-finding agency, leaving to some other court and some other case the enforcement of its findings.

7.

Because the Circuit Court of Appeals did not attach proper significance to the admissions of counsel for respondent in their brief that in a State court of competent jurisdiction respondent stands enjoined from demanding or enforcing higher rates and that the issue here involved is directly involved in said State court action; that the learned District Judge had the pleadings in that case before him on motion to remand and therefore had the discretion to require respondent to exhaust State remedies and that if the right result was reached in the District Court, the cause should have been affirmed instead of reversed.

8.

Because the Circuit Court of Appeals overlooked or ignored the averment in the petition of respondent that "there is need for a Declaratory Judgment and ancillary relief" (Tr. 3); the averments that the respondent had filed with the City new rates; that "the right thus to do is that whereas to a declaration by this Honorable Court is requisite" (Tr. 15); and the general prayer "for such other, further and general relief as in equity and good conscience may seem meet"; and the general aim and object of the petition to authorize the suspension of an old rate and the substitution of a new and higher gas rate.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

W. E. Morse,
Attorney for Petitioner.